

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN J. HEADLEY, et al.,) Case No. C07-717-JPD
Plaintiffs,)
v.)
FERRO CORPORATION,) ORDER DENYING DEFENDANT'S
Defendant.) MOTION TO STRIKE AND GRANTING
) IN PART AND DENYING IN PART
) DEFENDANT'S MOTION FOR
) SUMMARY JUDGMENT
)
)

I. INTRODUCTION AND SUMMARY CONCLUSION

The present matter comes before the Court on defendant Ferro Corporation's Motion for Summary Judgment and Motion to Strike. Dkt. Nos. 62, 66. Plaintiffs Steven and Susan Headley ("Plaintiffs") have filed a brief opposing these motions, Dkt. Nos. 75 and 88, to which Ferro has replied. Dkt. No. 80. Oral argument in this matter was held on May 19, 2008. After careful consideration of the motions, responses, governing law and the balance of the record, the Court ORDERS that defendant's Motion to Strike be DENIED and defendant's Motion for Summary Judgment be GRANTED IN PART AND DENIED IN PART.

II. FACTS AND PROCEDURAL HISTORY

This is a personal injury case. Plaintiff Steven Headley (“Mr. Headley”) has sued Ferro Corporation (“defendant” or “Ferro”) for damages he suffered as a result of his exposure to silica or silica-containing dry enamel products during the course of his employment at A.O. Smith Corporation from 1976 to 2005 as a sprayer in the manufacture of water heaters. A.O.

01 Smith is a corporation that manufactures, sells, and supplies boiler tanks and other products.
 02 Plaintiff worked at A.O. Smith's Seattle plant from 1976 to 1993, and thereafter at the Renton
 03 plant. His job consisted of manually spraying the inside of water heaters with a substance known
 04 as "frit," a vitreous material used in making porcelain, glazes, or enamels. Frit is the base
 05 ingredient of the product at issue that was manufactured and sold by Ferro in this case (Product
 06 Number 2772-2).

07 Plaintiffs allege that Mr. Headley was exposed to high amounts of silica when mixing,
 08 spraying, sanding and cleaning Ferro's product during his employment at A.O. Smith and is now
 09 disabled and suffers from silicosis as a result. *See* Dkt. No. 2 at 7; *see also* Dkt. No. 81, Ex. 9 at 3
 10 (Firestone Report) (diagnosing "classic" silicosis), *and* Dkt. No. 76 at 3 & Ex. 1 at 3, 7 (Dr. Smith
 11 Decl. and Report) (diagnosing slowly progressive complicated silicosis).¹ Plaintiffs allege that A.O.
 12 Smith purchased the silica-containing dry enamel product from defendant Ferro Corporation during
 13 the period in question to make the enamel mixture that was sprayed on the interior of water heaters
 14 during Mr. Headley's employment.² Damages are sought for the time period Ferro sold the frit to
 15 National Steel/A.O. Smith, which the parties agree was between the years of 1976 and 1993. Dkt.
 16 No. 2 at 5. Because nonparty A.O. Smith has already compensated plaintiff through the worker's
 17 compensation system, Ferro is the sole named defendant in this case. *See* R.C.W. §§ 51.04 *et seq.*,
 18 4.22.070(1).

19 The plaintiffs have made claims against Ferro for negligence, willful or wanton
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21 ¹ Silicosis is a progressive and incurable disease of the lungs caused by the prolonged
 22 inhalation of small respirable particles of crystalline silica. Dkt. No. 67, Ex. 18 at 245 (Dr.
 23 Roberts Report). "Silicosis is similar to asbestosis and asbestos-related injuries." *Riverwood*
Intern. Corp. v. Employers Ins. of Wausau, 420 F.3d 378, 384 (5th Cir. 2005) ("Courts have not
 24 found any meaningful difference between silicosis and asbestosis that would merit distinction for
 present purposes between the two.").

25 ² A.O. Smith purchased Mr. Headley's initial employer, National Steel, in 1977 and
 26 operated it at the Seattle location until 1996 or 1997, when the operation moved to Renton. After
 purchase by A.O. Smith and the subsequent move, Mr. Headley's job remained the same—he
 continued to work as a porcelain enamel sprayer. Dkt. No. 63, Ex. 3.

misconduct, product liability, product misrepresentation, breach of warranty, market share liability and/or market share alternate liability, and enterprise liability. Ferro has moved for summary judgment on all claims.

III. JURISDICTION

5 This action was removed pursuant to 28 U.S.C. § 1441. Pursuant to 28 U.S.C. §
6 636(c), the parties have consented to having this matter heard by the undersigned Magistrate
7 Judge. Subject matter jurisdiction exists under 28 U.S.C. § 1332. The Court has general and
8 specific personal jurisdiction over Ferro because it conducted substantial business in this
9 jurisdiction or otherwise purposely availed itself of the benefits and protections of the forum
10 state, and the alleged cause of action arose out of its forum-related activities. Venue is proper
11 under 28 U.S.C. § 1391(b).

IV. CHOICE OF LAW

Under the *Erie* Doctrine, a federal court sitting in diversity applies federal procedural law and the substantive law of the forum state—here, the State of Washington. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003). Should the Court be faced with a legal question unaddressed by the forum state’s judiciary, it must predict how the Washington Supreme Court “would probably rule in a similar case.” *King v. Order of United Commercial Travelers*, 333 U.S. 153, 161 (1948).

V. SUMMARY JUDGMENT STANDARD

20 "Claims lacking merit may be dealt with through summary judgment" under Rule 56 of
21 the Federal Rules of Civil Procedure. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).
22 Summary judgment "shall be entered forthwith if the pleadings, depositions, answers to
23 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
24 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
25 matter of law." Fed. R. Civ. P. 56(c). An issue of fact is "genuine" if it constitutes evidence
26 with which "a reasonable jury could return a verdict for the nonmoving party." *Anderson v.*

01 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). That genuine issue of fact is “material” if it
02 “might effect the outcome of the suit under the governing law.” *Id.*

When applying these standards, the Court must view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1013 (9th Cir. 2006). The moving party can carry its initial burden by producing affirmative evidence that negates an essential element of the nonmovant's case or by establishing that the nonmovant lacks the quantum of evidence needed to satisfy its burden of persuasion at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

Once this has occurred, the procedural burden shifts to the party opposing summary judgment, who must go beyond the pleadings and affirmatively establish a genuine issue on the merits of the case. Fed. R. Civ. P. 56(e). The nonmovant must do more than simply deny the veracity of everything offered or show a mere “metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The mere existence of a scintilla of evidence is likewise insufficient to create a genuine factual dispute. *Anderson*, 477 U.S. at 252. To avoid summary judgment, the nonmoving party must, in the words of the Rule, “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). The nonmoving party’s failure of proof “renders all other facts immaterial,” creating no genuine issue of fact and thereby entitling the moving party to the summary judgment it sought. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

VI. DISCUSSION

A. Defendant's Motion to Strike

23 Expert reports were due in this case by March 25, 2008. *See* Dkt. No. 59 (also
24 allowing plaintiffs opportunity to amend expert reports beyond such date). According to the
25 defendant, plaintiffs did not identify Dr. Dorsett Smith as an expert until April 22, 2008, “when
26 they submitted the Smith Declaration in opposition to Ferro’s motion for summary judgment.”

01 Dkt. No. 80 at 9-10. Defendant argues that for at least two reasons, Fed. R. Civ. P. 37
 02 mandates exclusion of Dr. Smith's declaration. *See* Dkt. No. 78 (Smith Decl.). First,
 03 defendant asserts that the declaration was untimely and insists that plaintiffs have provided the
 04 Court with no reason, much less "substantial justification," for its late disclosure of Dr. Smith's
 05 declaration. *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a
 06 witness as required by Rule 26(a) or (e), the party is not allowed to use that information or
 07 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
 08 substantially justified or is harmless."). Second, defendant argues that Dr. Smith's declaration
 09 should be stricken because plaintiffs failed to accompany his testimony with an expert report as
 10 required by Rule 26(a). This rule provides that expert disclosures "must be accompanied by a
 11 written report . . . if the witness is one retained or specially employed to provide expert
 12 testimony in the case or one whose duties as the party's employee regularly involve giving
 13 expert testimony." Fed. R. Civ. P. 26(a)(2)(B) (emphasis added).

14 The Court concludes that both of defendant's rationales fail to disqualify the
 15 declaration of Dr. Smith. First, plaintiffs' identification of Dr. Smith was neither untimely nor
 16 a surprise under Rule 37. On July 2, 2007—a mere two months after plaintiffs' case was
 17 removed to this court—plaintiffs identified the name and address of Dr. Smith in their initial
 18 disclosures as a person who had "treated Mr. Headley with respect to his silicosis or following
 19 his development of silicosis" and could provide relevant discoverable information. Dkt. No.
 20 83, Ex. 1 at 2-3, ¶ 5. On the same date, plaintiffs submitted Dr. Laura Perry's Medical
 21 Records related to Mr. Headley, which included Dr. Smith's report concerning Mr. Headley's
 22 silicosis. *See id.* Ex. 2. Indeed, defendant submitted this report to its *own* experts for their
 23 consideration in January 2008. *See id.* Exs. 3-4. Furthermore, plaintiffs provided additional
 24 timely disclosure regarding Dr. Smith in their expert disclosures of March 10, 2008. *See id.*
 25 Ex. 5 (informing defendant that treating physicians such as Dr. Smith "may be called as
 26 witnesses. Their testimony may include expert opinions as they relate to causation and/or

01 prognosis. Plaintiffs don't believe that they must include reports by Mr. Headley's treating
 02 physicians other than medical records, which have already been provided."). Accordingly,
 03 defendant's untimeliness argument is not entirely accurate and its claim of surprise is not
 04 supported by the record.³

05 Second, the Court disagrees with argument advanced by the defendant that expert
 06 reports are always required before a physician can express opinions as to causation, diagnosis,
 07 prognosis and the like. Dkt. No. 80 at 9-12. This appears to be the minority view. *See*
 08 *Sprague v. Liberty Mut. Ins. Co.*, 177 F.R.D. 78, 81 (D.N.H. 1998) ("The majority of other
 09 courts in the country have concluded that Rule 26(a)(2)(B) reports are not required as a
 10 prerequisite to a treating physician expressing opinions as to causation, diagnosis, prognosis
 11 and extent of disability where they are based on the treatment.") (collecting cases). The
 12 majority view recognizes that a treating or examining physician "may form an opinion about
 13 causation as a necessary part of the treatment rather than at the request of counsel, and the
 14 purposes of Rule 26 may be satisfied without a formal report." *Krischel v. Hennessy*, 533 F.
 15 Supp. 2d 790, 795 (N.D. Ill. 2008) (citing *Fielden v. CSX Transp. Inc.*, 482 F.3d 866, 870-71
 16 (6th Cir. 2007) (holding that a formal report is not required when determining causation is an
 17 integral part of treating a patient)); *see also Watson v. United States*, 485 F.3d 1100, 1107
 18 (10th Cir. 2007).

19 This view also comports with Congress's intentions in crafting the expert report
 20 requirement of Rule 26(a)(2)(B), which represents an attempt to balance "the fulsome and
 21 efficient disclosure of expert opinions" with a concern that reports should not be required in all
 22 situations. *Watson*, 485 F.3d at 1007. The specific purpose of the requirement to exchange
 23 expert reports is to eliminate unfair surprise to the opposing party and to conserve resources.

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 26 ³ Even assuming, for the sake of argument, that plaintiffs' disclosure of Dr. Smith was
 belated under Rule 37, the foregoing facts establish that such disclosure was harmless due to
 defendant's knowledge of Dr. Smith. *See also infra*, n.4.

01 *See, e.g., Minn. Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 460 (D. Minn.
 02 1998) (citation omitted).

03 Here, Dr. Smith's declaration closely tracks the opinions set forth in his April 2005
 04 report and are not based on information other than that which he gained in preparing that
 05 report over two years prior to the litigation in this case. *Compare* Dkt. No. 76 at 2-3, ¶¶ 3-6
 06 (Smith Decl. of April 2008), *with id.* Ex. 1 at 7, ¶¶ 1-7 (Smith Report of April 2005). Dr.
 07 Smith's declaration does not venture far beyond what he observed and concluded in 2005 and
 08 why he did so, does not go beyond his personal involvement in the facts predating this case,
 09 and does not constitute an opinion formed *because of* this lawsuit. *Krischel*, 533 F. Supp. 2d
 10 at 795 (noting that a doctor "who testifies about his observation, diagnosis and treatment of a
 11 patient is testifying about what he saw and did and why he did it, even though the physician's
 12 treatment and his testimony . . . are based on his specialized knowledge and training. [W]hen
 13 the treating physician's testimony is so limited . . . there is no need for a Rule 26(a)(2)(B)
 14 report.") (citing *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 757 (7th Cir. 2004) (internal
 15 punctuation omitted)). To that end, while Dr. Smith's specific discussion of the latency period
 16 is not discussed in the earlier report, his 2005 conclusion that Mr. Headley suffered from
 17 "complicated" silicosis provides a sufficient link, for the present purposes, to Dr. Smith's 2008
 18 latency details and counsel against the wholesale rejection of his 2008 declaration.⁴
 19 Furthermore, as noted above, this declaration could not have surprised the defendant, who was
 20 free to notice and take the deposition of Dr. Smith prior to the filing of dispositive motions if
 21 defendant believed that Dr. Smith's testimony would produce information both unfair and
 22 prejudicial.

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26 ⁴ In addition, the plaintiffs have submitted the expert opinions of Dr. Jordan A. Firestone,
 who also discussed latency periods of silicosis, thus the defendant can hardly claim surprise
 about latency testimony. *See* Dkt. No. 79, Ex. 3 (Firestone Dep.).

01 Under these circumstances, Dr. Smith's declaration falls outside of the disclosure
 02 requirements of Rule 26(a)(2)(B), and will be considered by the Court in ruling on defendant's
 03 motion for summary judgment. Defendant's Motion to Strike is therefore denied.

04 B. Defendant's Motion for Summary Judgment

05 Ferro requests that summary judgment be granted forthwith on each of plaintiffs'
 06 claims because (1) there is no evidence that Mr. Headley was ever "overexposed" to any
 07 respirable crystalline silica particles from a Ferro product; (2) even assuming such
 08 overexposure occurred, plaintiffs cannot show that the overexposure was a "substantial factor"
 09 in causing Mr. Headley's alleged disease; and (3) any alleged failure to warn on Ferro's part
 10 was not a proximate cause of plaintiffs' damages. Ferro further contends, in a footnote, that
 11 because no evidence exists regarding any unreasonably safe product design, misrepresentation
 12 or breach of warranty by Ferro, summary judgment should be entered on those claims as well.

13 1. *Summary Judgment is Not Proper on the Issues of Exposure
 14 and Substantial Factor*

15 Ferro claims that because there is no direct evidence that Mr. Headley was ever
 16 "overexposed" to any respirable crystalline silica particles from a Ferro product, summary
 17 judgment should be granted for Ferro on plaintiffs' negligence claims. Dkt. No. 62 at 2, 11-14
 18 (citing *Lockwood v. AC&S, Inc.*, 109 Wash.2d 235, 245, 744 P.2d 605 (1987) (negligence and
 19 strict liability lawsuit brought by a plaintiff who developed asbestosis after working over forty
 20 years at various Seattle shipyards)).

21 This, however, is not the law. The word "overexposure" appears nowhere in the
 22 *Lockwood* decision. In that case, the Washington Supreme Court determined that some
 23 evidence of "exposure," not overexposure, was necessary to establish a finding of proximate
 24 causation. *Lockwood*, 109 Wash.2d at 237-38, 744 P.2d at 607-08. For purposes of
 25 proximate causation, the court did not require that the exposure, or inference of exposure, to
 26 the defendant's asbestos-containing product must exceed any threshold limit value ("TLV") or

01 permissible exposure limit (“PEL”), as Ferro suggests for this case. *See* Dkt. No. 66 at 12-14.
02 Indeed, the *Lockwood* court determined that a reasonable jury could find causation in the case
03 even though there was no direct evidence that the plaintiff worked directly with the asbestos
04 product at issue, unlike the facts that plainly exist regarding Mr. Headley here. *Lockwood*, 109
05 Wash.2d at 247, 744 P.2d at 612-13 (“[E]ven if [plaintiff] did not work directly with
06 [defendant’s asbestos] product on the *George Washington*, it is reasonable to infer that since
07 that product was used on that ship when [plaintiff] worked there, [plaintiff] was exposed to
08 it.”). When this evidence was combined with Mr. Lockwood’s expert’s testimony that “all
09 exposure to asbestos has a cumulative effect in contributing to the contraction of asbestosis,”
10 the court considered it “reasonable for the jury to conclude that the plaintiff’s exposure to
11 [defendant’s] product was a proximate cause of his injury.” *Id.*

12 If such evidence was sufficient for *a finding* of proximate causation in *Lockwood*, then
13 clearly plaintiffs’ evidence is sufficient to create a genuine issue of material fact on causation
14 here. The parties do not dispute that the Ferro product in question (containing approximately
15 10% crystalline silica) was sold to A.O. Smith and used routinely by Mr. Headley while mixing
16 and spraying the enamel mixture in a water heater tank coating area from at least 1976 to
17 1993. *See, e.g.*, Dkt. No. 66 at 6 n.5 (defendant’s brief); *see also id.* at 8 (noting that such
18 exposure, *inter alia*, continued “during the entire length of [Mr. Headley’s] employment at
19 A.O. Smith.”). This spraying was commonly performed in small makeshift spray booths or
20 inside larger tanks Mr. Headley would have to climb inside of to spray. Dkt. No. 76, Ex. 1 at
21 2 (Dr. Smith Report). There also appears to be no dispute, or at minimum an issue of material
22 fact, that Mr. Headley was subject to “rebound particles” of crystalline silica—or particles that
23 struck the tank surface but did not adhere—created through the use of Ferro’s product when
24 Mr. Headley sanded the sprayed tank vessels and cleaned his work areas. *See, e.g.*, Dkt. No.
25 77 at 2-3, ¶ 4 (Dr. Rose Decl.). Finally, the report and declaration of Dr. Smith establishes
26 that Mr. Headley’s silicosis was caused by the cumulative effect of all his exposure to

01 crystalline silica during the twenty-year latency period. *See* Dkt. No. 76 at 2-3, ¶¶ 3-6 (Smith
 02 Decl. of April 2008), *and id.* Ex. 1 at 7, ¶¶ 1-7 (Smith Report of April 2005); *see also* Dkt.
 03 No. 79, Ex. 3 at 70-71 (Firestone Dep.) (similar). A strikingly similar expert opinion on the
 04 cumulative effect of a manufacturer's asbestos product resulted in a *prima facie* case of
 05 proximate causation against the manufacturer in *Lockwood*. *See Lockwood*, 109 Wash.2d at
 06 247-248, 744 P.2d at 613.

07 Such evidence, when coupled with the conclusions by plaintiffs' additional experts, also
 08 establishes a genuine issue of material fact that Mr. Headley's exposure to Ferro's crystalline
 09 silica-containing product constituted a "substantial factor" in causing his silicosis. *See*
 10 *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wash.App. 22, 30, 935 P.2d 684, 688 (1997)
 11 (holding that when multiple asbestos products exists as potential causes of asbestosis, a
 12 plaintiff can prevail by showing "that the defendant's product was a substantial factor in
 13 bringing about the injury").⁵

14 In an attempt to avoid this conclusion, Ferro makes two broad arguments: (1) that any
 15 exposure Mr. Headley may have had to a Ferro product "would not rise to the level of a
 16 'substantial factor' . . . when it is clear that Headley was also exposed to silica-containing
 17 products manufactured by A.O. Smith (VS 261) and other companies during [the relevant
 18 period]"; and (2) because no industrial hygiene surveys were conducted at A.O. Smith from
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 23 ⁵ The "substantial factor" test for causation is used when an asbestos or similarly situated
 24 plaintiff is unable to show that one event alone was a cause of the injury. *Mavroudis*, 86
 25 Wash.App. at 30, 935 P.2d at 688. In such a circumstance, the plaintiff does not have to prove
 26 or apportion individual causal responsibility. *See Hue v. Farmboy Spray Co., Inc.*, 127 Wash.2d
 67, 91, 896 P.2d 682, 695 (1995). Instead, he or she need only establish that the defendant's
 product was among other sources of exposure in the plaintiff's environment that cumulatively
 caused the disease. *Lockwood*, 109 Wash.2d at 245-47, 744 P.2d 610-12.

01 1976 through 1993, no plaintiff could ever establish exposure to Ferro's product amounting to
 02 a substantial factor. Dkt. No. 66 at 7, 15-16.⁶

03 Both contentions fail. The first argument underscores exactly the kind of situation that
 04 calls for application of the substantial factor test, in order that no supplier enjoy a proximate
 05 causation defense on the ground that Mr. Headley likely would have suffered the same disease
 06 from inhaling crystalline silica originating from the products of other suppliers during the
 07 relevant time period. *See Mavrooudis*, 86 Wash.App. at 30-32, 935 P.2d at 688-89; cf. *Hue v.*
 08 *Farmboy Spray Co., Inc.*, 127 Wash.2d 67, 91 & n.22, 896 P.2d 682, 695 & n.22 (1995).
 09 Indeed, there exists a genuine issue of material fact regarding whether *any* post-1993 exposure
 10 could have caused Mr. Headley's silicosis. Dr. Smith's explains in his declaration that, given
 11 the twenty-year latency period of silicosis, Mr. Headley's exposure to A.O. Smith's silica-
 12 containing product, which began eleven years before his 2004 silicosis diagnosis, could not
 13 have caused the disease. *See* Dkt. No. 76 at 2, ¶ 4 (Smith Decl.). Dr. Firestone's deposition
 14 provides further support for this conclusion. *See* Dkt. No. 79, Ex. 3 at 70-71 (Firestone Dep.)
 15 (describing similar latency or "lagging" period and concluding that "the period of '96 to '05 . . .
 16 . . . would [therefore] not factor substantially into my assessment of causation of his condition").
 17 Ferro attempts to settle this genuine issue by referring to the deposition of Dr. Hammar, but
 18 his statements could reasonably be interpreted to support either side in this dispute. *See* Dkt.
 19 No. 81, Ex. 1 at 60-61 (noting that latency period for silicosis generally stretches "15 to 30
 20 years," but acknowledging that outliers might exist and that an "acute" case might tend to the
 21 lower range of that scale, or lower). At best, defendant's position intensifies, rather than
 22 dispels, the genuine dispute of material fact on this issue.

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25 ⁶ This argument was extended by defendant's counsel during oral argument in this case,
 26 wherein counsel concluded, in answer to the Court's questioning, that if an employer such as A.O. Smith fails to perform an industrial hygiene survey, no employee plaintiff could ever recover under the substantial factor test.

01 The Court also disagrees with Ferro's second argument. While Ferro is correct that
 02 no industrial hygiene surveys were conducted at A.O. Smith from 1976 through 1993, the
 03 record contains studies and other data which allow industrial hygiene experts to estimate
 04 exposure for the time period in question in this case. In March 2000, an industrial hygiene
 05 consultant, Schumacher & Associates, conducted a survey of A.O. Smith's Renton facility
 06 (where Mr. Headley worked) and issued a comprehensive report (the "Schumacher Report").
 07 *See* Dkt. No. 67, Ex. 8. These measurements were taken when Mr. Headley was using a
 08 porcelain enamel mixture containing approximately 20% crystalline silica manufactured by
 09 A.O. Smith. *See id.* Ex. 9 at 149 (Firestone Decl. Addendum); Dkt. No. 66 at 14, n.12.

10 For purposes of this motion, Ferro does not dispute that Mr. Headley performed the
 11 same job in 2000 that he did in earlier years, and plaintiffs have further provided evidence of
 12 the similarity between the Seattle and Renton plants regarding such things as the overspray
 13 cloud common to Mr. Headley's daily spraying routine. *See, e.g.*, Dkt. No. 79, Ex. 3 at 11-13,
 14 16 (Dr. Firestone Dep.).⁷ To make conclusions regarding exposure levels and causation in *this*
 15 case, plaintiffs' experts have utilized the objective hygiene data from the Schumacher Report to
 16 estimate Mr. Headley's exposure to a portion (10%) of the same type of particulates at an
 17 earlier time—specifically, his 1976 to 1995 exposure to Ferro's product. *See* Dkt. No. 77 at 3,
 18 ¶ 6 (Dr. Rose Decl.) (concluding that exposure to airborne respirable crystalline silica between
 19 0.27 and .40 mg/m³, "well in excess of the WISHA and NIOSH exposure levels of 0.10 and
 20 0.05 mg/m³"), *and* Dkt. No. 67, Ex. 3 at 149-50 (Dr. Firestone Decl. Addendum) (similar;
 21 noting 0.41 mg/m³, an exposure level for 1976 to 1995, exceeding the OSHA PEL).

22 Not only is there expert testimony in the record supporting this methodology as
 23 commonplace in the industrial hygiene profession, see Dkt. No. 79, Ex. 2 at 162-63 (Rose
 24 Dep.), but defendant's *own expert* used this analysis to conclude, favorable to the defendant,

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 26 ⁷ Indeed, Dr. Firestone opines that Mr. Headley's exposure to silica was *higher* in Seattle
 than it was in Renton, where he began wearing a "half face respirator." *See* Dkt. No. 79, Ex. 3
 at 11-12, 15-16 (Dr. Firestone Dep.).

01 that Mr. Headley's 1976-1995 exposure to the Ferro product was within normal limits and
 02 thus not a substantial factor in causing his silicosis. *See* Dkt. No. 64 at 7, ¶ h (Dr. Rock Decl.)
 03 calculating much lower level of exposure "while spraying the Ferro product," i.e., between
 04 0.017 mg/m³ and 0.081 mg/m³). Defendant's expert concluded that such "reasoning by
 05 analogy with breathing zone data collected in a different facility while Headley was spraying
 06 with a different product supports the hypothesis that his time weighted average exposures
 07 during his use of the Ferro product did not exceed the more conservative [TLV] or the even
 08 more conservative [recommended exposure limit]." *Id.* at 2; *but see* Dkt. No. 77 at 2-3 (Dr.
 09 Rose Decl.) (attacking Dr. Rock's conclusions). The unsurprising fact that Dr. Rock came to
 10 a different conclusion than that of plaintiff s' experts is of no moment for summary judgment
 11 purposes. More probative at this juncture is Dr. Rock's willingness to engage in the same
 12 expert methodology to analyze and quantify Mr. Headley's exposure to Ferro's silica-
 13 containing product.

14 In sum, this evidence, when viewed in a light most favorable to the plaintiffs,
 15 establishes genuine issues for trial on the issue of whether Mr. Headley's exposure to Ferro's
 16 product was a substantial factor in causing his silicosis. As a result, proximate cause becomes
 17 a jury question unless there is no genuine issue of material fact that certain conduct by A.O.
 18 Smith constitutes a superceding cause. *See Sharbano v. Universal Underwriters Ins. Co.*, 139
 19 Wash.App. 383, 421, 161 P.3d 406, 426 (2007) ("[T]he substantial factor test is an
 20 appropriate method to determine proximate cause when the causation question requires the
 21 jury to consider not only what occurred but also what might have occurred.") (citing
 22 *Herskovits v. Group Health Coop.*, 99 Wash.2d 609, 617, 664 P.2d 474 (1983)).

23 2. *Genuine Issues of Material Fact Exists as to Ferro's Failure to*
 24 *Warn and/or Inadequate Warnings*

25 Washington's product liability statute provides that "[a] product manufacturer is
 26 subject to liability to a claimant if the claimant's harm was proximately caused by the

01 negligence of the manufacturer in that the product was not reasonably safe as designed.”
02 R.C.W. § 7.72.030(1). A product is “not reasonably safe” if it lacks adequate warnings. *Id.* §
03 7.72.030(1)(b). To succeed on such a claim, “the plaintiff must prove that his . . . injuries were
04 proximately caused by [the] product” alleged to be unsafe. *Soproni v. Polygon Apt. Partners*,
05 137 Wash.2d 319, 325, 971 P.2d 500, 504 (1999) (citing R.C.W. § 7.72.030(1)). Ferro
06 insists that summary judgment be granted on plaintiffs’ inadequate warnings claim for a want
07 of proximate causation on two independent grounds: (1) there being no evidence that any other
08 warnings, if provided to A.O. Smith, would have been considered and heeded by A.O. Smith
09 or Mr. Headley; and (2) that A.O. Smith’s failure to meet its duty to train, warn, and protect
10 its employees as required by the “Sophisticated User Doctrine” constitutes a superceding
11 cause. Dkt. No. 66 at 16-22.

12 The Court rejects both arguments. First, genuine issues of material fact abound
13 regarding whether A.O. Smith and Mr. Headley did heed Ferro’s warnings and would have
14 heeded additional, more adequate warnings had they been provided by Ferro. The 1985
15 material safety data sheets (“MSDSs”) referenced by Ferro mentioned the existence, effects,
16 and consequences of “silicate dust.” Dkt. No. 79, Ex. 13 at 202 (Nov. 13, 1985 MSDS). The
17 far more harmful product of crystalline *silica* was never mentioned. Plaintiffs’ expert, Dr.
18 Rose, has offered detailed explanations as to the deficiencies in and misleading nature of this
19 and other of Ferro’s MSDSs in the 1980s as well as the warning label affixed to its product
20 bags during the 1970s and 1990s. Dkt. No. 79, Ex. 6 at 6-11 (Dr. Rose Report); *see also id.*
21 Ex. 3 at 3-6 (Dr. Karnes Report) (similar).

22 Ferro does not attack these opinions, but instead contends that this evidence is
23 irrelevant because it is undisputed that “no one from A.O. Smith read or relied on Ferro’s
24 MSDS while Ferro’s product was in use.” Dkt. No. 80 at 5 n.7. Contrary to Ferro’s
25 contention, however, there *is* evidence in the record that certain of these MSDS sheets were
26 read, considered and acted upon by A.O. Smith and Mr. Headley. One such example involves

01 a November 1985 MSDS which stated that Ferro's Product Number 2772-2 did not contain
 02 cobalt. *See* Dkt. No. 79, Ex. 7. Four years later, on July 26, 1989, Ferro sent A.O. Smith an
 03 MSDS indicating that this product *did* contain cobalt. *See id.* Ex. 8 at 5. Less than one month
 04 later, due to concerns raised by A.O. Smith and certain of its employees, the company sent
 05 several of its Seattle-based employees to Dr. John Holland at Virginia Mason Hospital to
 06 conduct laboratory work and quantitative analysis for "possible overexposure to cobalt at your
 07 workplace, A.O. Smith." *Id.* Ex. 9. (Dr. Holland Letter of Oct. 26, 1989). Mr. Headley was
 08 one of these employees. *See id.* (letter to Mr. Headley regarding results of his examination),
 09 *and* Ex. 10 at 54-55 (Hunt Dep.) (stating, as A.O. Smith Seattle supervisor, that a discussion
 10 of the MSDS is what led to the cobalt concerns and subsequent laboratory testing).

11 Furthermore, defendant's argument regarding statements made in Mr. Headley's
 12 deposition testimony and subsequent declaration does not resolve what is otherwise a genuine
 13 issue of material fact on whether Mr. Headley would have heeded any additional warnings.
 14 The same materials, which must be viewed in a light most favorable to the plaintiffs, establish
 15 Mr. Headley's understanding from Ferro's warnings⁸ that "I should wear my dust mask or
 16 respirator when I was spraying or being around a lot of the dust so I wouldn't breathe it in,"
 17 Dkt. No. 67, Ex. 2 at 209-10, and include the statements of Mr. Headley's supervisor that he
 18 never saw Mr. Headley spray without a mask or respirator and regarded him as "one of the
 19 more careful guys that I've ever had in that area." *Id.* Ex. 10 at 34-35 (Hunt. Dep.).
 20 Moreover, despite the conclusions of plaintiffs' experts regarding the deficient and/or
 21 misleading warnings affixed to Ferro's product in this case, Ferro failed to ask Mr. Headley
 22 during his deposition what he would have done had the warnings contained the additional
 23 information plaintiffs' experts deemed necessary (for example, that silica dust could remain in
 24

25 ⁸ According to the plaintiffs, this warning stated: "Caution, this product may contain
 26 siliceous or toxic material, for manufacturing use only, do not make dust, inhale dust, fumes or
 vapors, permit prolonged contact with skin, permit to contaminate food or feedstuff." Dkt. No.
 79, Ex. 11 at 67-68 (Faust Dep.).

01 the air for substantial periods of time in the absence of visible dust and that a respirator should
 02 be worn in these circumstances). *See, e.g.*, Dkt. No. 77 at 2-4, ¶¶ 4-7 (Rose Decl.); *see also*
 03 Dkt. No. 78 at 1, ¶ 2 (Headley Decl.) (“I did not understand after reading the warning that I
 04 should wear my dust mask or respirator after I mixed [and sprayed] the product, [when] I
 05 could see little, if any, dust in the air.”). Mr. Headley’s declaration answers this question by
 06 stating that, were such information given, he would have worn the dust mask/respirator for the
 07 entire day, rather than the usual five hours per day he usually wore it. Dkt. No. 78 at 2, ¶ 3
 08 (Headley Decl.). At the very least, genuine factual disputes exist regarding whether Mr.
 09 Headley knew, or was ever made properly aware by Ferro, that breathing silica was possible
 10 even when the air appeared clear, as well as whether a warning indicating as much would have
 11 affected his safety decisions. *See, e.g.*, *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117
 12 Wash.2d 747, 755-756, 818 P.2d 1337, 1341 (1991) (holding that plaintiffs’ contention “that
 13 had they been warned of the dangers of aspirating baby oil, the accident would have been
 14 avoided” satisfied the requirements of R.C.W. § 7.72.030(1)(b)).

15 3. *Summary Judgment Is Improper on the Sophisticated User*
 16 *Doctrine and the Issue of Superceding Cause*

17 Ferro’s second causation argument attempts to shift the burden of warning those
 18 exposed to silica to A.O. Smith, which it contends failed miserably in this role by neglecting to
 19 properly train, supervise, and care for its employees. *See* Dkt. No. 66 at 19-22. As a matter of
 20 law, Ferro argues that the “Sophisticated User Doctrine” provides that a manufacturer “has no
 21 duty to warn users when it supplies its product to a user who knows or reasonably should
 22 know of a product’s dangers.” Dkt. No. 66 at 19 n.17 (citing *Humble Sand & Gravel, Inc. v.*
 23 *Gomez*, 146 S.W.3d 170 (Tex. 2004); *Smith v. Walter C. Best, Inc.*, 927 F.2d 736 (3rd Cir.
 24 1990); *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552 (W.D. Va. 1984)). This analysis
 25 effectively treats A.O. Smith as a superceding cause, particularly when considering the Court’s
 26

01 above rulings on summary judgment.⁹

02 Ferro has not cited, and this Court cannot find, a single Washington case adopting or
 03 applying the Sophisticated User Doctrine. During oral argument in this matter, counsel for
 04 Ferro conceded that the doctrine has not been formally adopted by any Washington court.¹⁰
 05 As a general matter, Washington law provides that a manufacturer “has a duty to warn the
 06 ultimate user of any dangers in its product (other than those that are open or obvious).”
 07 *Minert v. Harsco Corp.*, 26 Wash.App. 867, 875, 614 P.2d 686, 691 (1980). “This duty is
 08 non-delegable.” *Id.*

09 In *Campbell v. ITE Imperial Corporation*, 107 Wash.2d 807, 733 P.2d 969 (1987), an
 10 employee of public utility district (“PUD”) brought an action against a manufacturer of an
 11 electrical switchgear for injuries he sustained while working on auxiliary bushings that should
 12 have been de-energized. The question presented to the Washington Supreme Court was
 13 “whether the negligence of appellant’s employer in failing to warn of or protect appellant from
 14 respondent’s allegedly unsafe product constitutes an intervening act legally sufficient to

15

16 ⁹ A defendant’s conduct is not a proximate cause of the harm if, although it otherwise
 17 might have been a proximate cause, a superseding cause intervenes. A superseding cause is “an
 18 act of a third person or other force which by its intervention prevents the actor from being liable
 19 for harm to another which his antecedent negligence is a substantial factor in bringing about.”
Restatement (Second) of Torts § 440 (1965); *Campbell v. ITE Imperial Corp.*, 107 Wash.2d 807,
 20 812, 733 P.2d 969, 972 (1987). “[O]nly intervening acts which are not reasonably foreseeable are
 21 deemed superseding causes.” *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wash.App. 432, 442,
 22 739 P.2d 1177, 1184 (1987). “A superseding cause exists if the acts of the plaintiff or a third
 party are so highly extraordinary or unexpected that [they] can be said to fall without the realm
 of reasonable foreseeability as a matter of law.” *Cramer v. Dep’t of Highways*, 73 Wash.App. 516,
 521, 870 P.2d 999, 1001 (1994) (quotation omitted) (alteration by *Cramer* court).

23 ¹⁰ Counsel for Ferro also analogizes this doctrine to the “learned intermediary rule”
 24 adopted by the Washington Supreme Court in *Terhune v. A.H. Robins Co.*, 90 Wash. 9, 577 P.2d
 25 975 (1978). This rule, however, appears to be limited to cases involving the relationship between
 a drug manufacturer, a prescribing physician and his or her patient, and is therefore not a proper
 fit for this case. See, e.g., *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122
 26 Wash.2d 299, 313, 858 P.2d 1054, 1061 (1993). In this “unique relationship,” the physician
 “stands in the shoes of the ‘ordinary consumer’ of the drug” and is therefore “the logical person
 to be the ‘private attorney general’ under RCW 19.86.090.” *Id.* (footnotes omitted).

01 operate as a superseding cause." *Id.* at 808, 733 P.2d at 970. The court held that the trial
 02 court erred in giving a superseding cause instruction, and therefore reversed and remanded the
 03 case for a new trial. *Id.* Before doing so, however, the court reiterated the abovementioned
 04 general causation principles by stating as follows:

05 The manufacturer bears responsibility for affixing an adequate warning to its
 06 product, *see Teagle v. Fischer & Porter Co.*, 89 Wash.2d 149, 155, 570 P.2d
 07 438 (1977), and this duty generally is not delegable. *Minert v. Harsco Corp.*,
 26 Wash.App. 867, 874, 614 P.2d 686 (1980). Thus, it would be anomalous to
 hold that an employer's failure to warn constituted a superseding cause.

08 *Id.* at 814, 733 P.2d at 973

09 The court concluded its analysis with the following substantive outline, applicable to
 10 both negligence and strict products liability theories:

11 In sum, we hold that an employer's failure to warn or protect an employee from
 12 a product which is unreasonably unsafe, unless accompanied by a warning, does
 13 not constitute a superseding cause, unless (1) the employer's intervening
 14 negligence created a different type of harm; or (2) the employer's intervening
 15 negligence operated independently of the danger created by the manufacturer;
 or (3) the employer had actual, specific knowledge that the product was
 unreasonably unsafe and failed to warn or protect. Because there is no such
 evidence in the record of this case, the trial court erred in giving a superseding
 cause instruction.

16 *Id.* at 817, 733 P.2d at 974-75.

17 In the present case, no evidence or argument has been presented that Mr. Headley's
 18 injury was not foreseeable to Ferro, or that his injury was produced by a different type of harm
 19 or operated independently from the danger created by his various repetitive exposures to
 20 Ferro's silica-containing product. Furthermore, the final element discussed in *Campbell*, the
 21 employer's knowledge and failure to act, cannot be decided on summary judgment due to
 22 disputed material facts discussed above regarding Ferro's inaccurate and inadequate warnings
 23 and A.O. Smith's attempts and successes in warning and protecting its employees. *See supra* §
 24 VI.B.2. Summary judgment is therefore inappropriate on the issue of a superceding cause.

25 4. *Summary Judgment is Proper on Plaintiffs' Misrepresentation Claim*

26 Ferro has also moved for summary adjudication on plaintiffs' misrepresentation claim.

01 Dkt. No. 66 at 22 n.21. Plaintiffs have not opposed this motion and indeed conceded this issue
02 during oral argument in this matter. Accordingly, defendant's motion for summary judgment is
03 granted with regard this claim.

04

05 5. *Further Briefing is Directed on Plaintiffs' Defective and Negligent*
05 *Design and Breach of Warranty Claims*

06 Ferro moved for summary judgment on these claims in a footnote. Dkt. No. 66 at 22
07 n.21. Plaintiffs responded with three paragraphs that reference one statement and two
08 deposition words by plaintiffs' expert, Dr. Clifton Bergeron. Dkt. No. 75 at 23. Ferro's reply
09 concludes that plaintiffs have failed to establish a defective design claim under either the risk-
10 utility test or the consumer expectations test. Dkt. No. 80 at 8.

11 The state of the record does not permit the Court to rule on these issues at this time.
12 The arguments of the parties, as well as the attached snippets of Dr. Bergeron's deposition and
13 declaration, do not provide the Court with sufficient information to determine the applicability
14 of the risk-utility or consumer expectations test and prevent the Court from applying Dr.
15 Bergeron's conclusions to the facts in this case. Moreover, it is not clear from the limited
16 material that was submitted whether Dr. Bergeron knows the A.O. Smith product line, or
17 whether Dr. Bergeron was aware that the A.O. Smith product line included silica-containing
18 products.

19 Accordingly, the parties are DIRECTED to file briefs addressing these issues not
20 longer than ten (10) pages in length by not later than Wednesday, May 28, 2008. Any
21 limited additional portions of Dr. Bergeron's deposition testimony necessary to establish a
22 foundation can be submitted as an appendix that will not be included as part of the page
23 limitations. No opposition briefs shall be submitted. This briefing should also indicate whether
24 plaintiffs' claims for breach of warranty and other unaddressed claims remain in this case. See
25 Dkt. No. 66 at 22 n.21.

26

VII. CONCLUSION

02 For the foregoing reasons, defendant Ferro Corporation's Motion to Strike (Dkt. No.
03 81) is DENIED, and its Motion for Summary Judgment (Dkt. Nos. 62, 66) is GRANTED IN
04 PART AND DENIED IN PART, for the reasons stated by the Court. Further briefing is also
05 directed as indicated by the Court. The Clerk of Court is directed to send a copy of this Order
06 to the parties of record.

DATED this 22nd day of May, 2008.

James P. Donohue

~~JAMES P. DONOHUE~~
United States Magistrate Judge